U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0147 BLA

JAMES H. MILLS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY, LLC	)	DATE ISSUED: 02/23/2016
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Awarding and Partly Denying Fees of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Order Awarding and Partly Denying Fees (2012-BLA-5219) of Administrative Law Judge Pamela J. Lakes, with respect to a miner's subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act).

Claimant filed this subsequent claim[1] for benefits on May 22, 2005, which was

denied by Administrative Law Judge Larry W. Price on July 2, 2007, because the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total respiratory disability pursuant to 20 C.F.R. §718.204(b). On February 1, 2008, claimant requested modification.

Following a hearing, Administrative Law Judge Robert B. Rae denied the modification request on October 27, 2009, finding that the evidence was insufficient to establish the existence of pneumoconiosis or total respiratory disability. Consequently, Judge Rae found that claimant failed to establish either a change in conditions or a mistake in a determination of fact in the prior denial of benefits. On August 25, 2010, claimant again requested modification.

Claimant's second modification request was denied on December 9, 2010 by the district director's office for failure to establish the existence of pneumoconiosis or total respiratory disability. Claimant filed his third request for modification on March 10, 2011.

On June 17, 2014, Administrative Law Judge Pamela J. Lakes (the administrative law judge) issued a Decision and Order on Modification Granting Benefits. Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] the administrative law judge found that claimant established total respiratory disability and was entitled, therefore, to invocation of the rebuttable presumption that the miner's disability was due to pneumoconiosis. The administrative law judge further determined that employer failed to establish rebuttal of the presumption, and granted claimant's modification request pursuant to 20 C.F.R. §725.310 on the basis of a change in conditions as of March 1, 2011.

Claimant's counsel, Joseph E. Wolfe, submitted three fee petitions to the administrative law judge for work performed before the Office of Administrative Law Judges: the first, for work performed before Judge Price; the second, for work performed

---

[1] Claimant's prior claims, filed in 1973 and 2001, were finally denied by the district director. *See* May 28, 2014 Decision and Order at 2.

[2] Congress enacted amendments to the Act, applicable to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this miner's claim, the amendments reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), which provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that the miner is totally disabled due to pneumoconiosis.

before Judge Rae; and the third, for work performed before the administrative law judge. Claimant's counsel also filed an amended fee petition seeking reimbursement for costs omitted on the first and third fee petitions. In the first fee petition, claimant's counsel requested a total fee of $5,325.00 for work performed before Judge Price from June 29, 2006 to August 6, 2007, representing 7.75 hours of legal services by Joseph E. Wolfe at an hourly rate of $300; 10 hours of legal services by Ryan C. Gilligan at an hourly rate of $225; 2.75 hours of legal services by W. Andrew Delph, Jr. at an hourly rate of $200; 2 hours of services by legal assistants at an hourly rate of $100; and costs in the amount of $97.90.

In the second fee petition, Mr. Wolfe requested a total fee of $3,950.00 for work performed before Judge Rae from August 21, 2008 to August 4, 2010, representing 7.25 hours of legal services by Joseph E. Wolfe at an hourly rate of $300; 2.75 hours of legal services by W. Andrew Delph, Jr. at an hourly rate of $200; 12.25 hours of services by legal assistants at an hourly rate of $100; and costs in the amount of $140.66.

In the third fee petition, Mr. Wolfe requested a total fee of $11,375.00 for work performed before the administrative law judge from December 2, 2011 to June 3, 2014, representing 21 hours of legal services by Joseph E. Wolfe at an hourly rate of $300; 1.5 hours of legal services by Ryan C. Gilligan at an hourly rate of $225; 4.5 hours of legal services by W. Andrew Delph, Jr. at an hourly rate of $200; 2.75 hours of legal services by Brad A. Austin at an hourly rate of $150; 34.25 hours of services by legal assistants at an hourly rate of $100; and costs in the amount of $96.43.

In the amended fee petition, claimant's counsel sought additional costs in the amount of $4,718.92, representing $1,305.32 for work performed from June 29, 2006 to August 6, 2007 and $3,413.60 for work performed from December 2, 2011 to June 3, 2014.

Following consideration of employer's objections to the fee petitions, the administrative law judge determined that the work performed for each of the two earlier periods before Judge Price and Judge Rae was reasonable, relevant, and necessary to the ultimate award of benefits. The administrative law judge also determined that the requested hourly rates for Messrs. Wolfe, Gilligan and Delph and the legal assistants were appropriate, but denied all attorney fees requested for work performed by Mr. Austin because no information was provided with respect to his qualifications and experience. The administrative law judge further approved the number of billable hours for Messrs. Wolfe, Gilligan and Delph and the legal assistants, but denied all billable hours for Mr. Austin. The administrative law judge also disallowed all costs requested for the period of June 29, 2006 to August 6, 2007; disallowed $121 of costs requested for the period of August 21, 2008 to August 4, 2010; and allowed all of the $96.43 in costs requested for the period of December 2, 2011 to June 3, 2014. The administrative law

judge further allowed all costs requested in the amended fee petition in the amount of $4,718.92, for total costs of $4,835.01. Accordingly, the administrative law judge awarded claimant's counsel a total fee of $20,237.50 and total costs of $4,835.01 for services performed while the case was before the Office of Administrative Law Judges.

On appeal, employer challenges the fee award, asserting that counsel's first two fee petitions do not represent work that constitutes the successful prosecution of a claim. Claimant's counsel has responded in support of the fee award. The Director, Office of Workers' Compensation Programs, has declined to file a response brief.

The amount of attorney fees awarded by an administrative law judge is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law. *See Jones v. Badger Coal Co*., 21 BLR 1-102, 1-108 (1998)(en banc); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980). In order for counsel to receive compensation for legal services performed on a claimant's behalf, there must be a successful prosecution of the claim. *See* 33 U.S.C. §928(a), as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §725.367; *Beasley v. Sahara Coal Co*., 16 BLR 1-16 (1991). The Board has held that counsel is entitled to fees for all necessary services rendered on behalf of the claimant at each level of the adjudicatory process, even if he was unsuccessful at a particular level, so long as the claimant is ultimately successful in prosecuting the claim. *Murphy v. Director, OWCP*, 21 BLR 1-116, 1-120 (1999); *see Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-140 (1993).

Employer contends that claimant's counsel should not have been awarded fees for services performed before Judge Price from June 29, 2006 to August 6, 2007, and Judge Rae from August 21, 2008 to August 4, 2010, because benefits were denied by Judge Price and modification was not granted by Judge Rae. Employer maintains that the legal services provided by claimant's counsel during those time periods did not constitute the winning of a contested case, the successful prosecution of a claim, or success in establishing or preserving claimant's entitlement to benefits. Employer argues that these prior proceedings did not advance claimant's cause, and that the third modification proceeding essentially stood alone as a successful prosecution of the claim for benefits. We reject employer's argument.

Employer does not contest that these proceedings constitute a single claim. *See* 20 C.F.R. §725.310. Thus, lack of success at a particular level does not render the legal services provided at that stage of the proceedings unnecessary. *See Murphy*, 21 BLR at 1-120. Rather, the Board has held that the "standard test for the administrative law judge to consider in determining whether the services performed by [an] attorney were necessary is whether the attorney, *at the time the work was performed*, could reasonably regard the work as necessary to the establishment of entitlement." *Murphy*, 21 BLR at 1-

120 (emphasis added). In this case, the administrative law judge specifically found that the work performed in the proceedings before Judge Price and Judge Rae was "reasonable, relevant, and necessary" to the ultimate award of benefits. Decision and Order at 3. As employer has not advanced a persuasive argument to warrant consideration of certain proceedings within this claim as unnecessary, we affirm the administrative law judge's finding that the legal services provided by claimant's counsel were relevant, necessary, and reasonable. Moreover, because employer does not challenge the administrative law judge's findings in any other respect, we affirm the administrative law judge's award of attorney fees and expenses.

Accordingly, the administrative law judge's Order Awarding and Partly Denying Fees, requiring employer to pay claimant's counsel $20,237.50 for legal services rendered to claimant while the case was before the Office of Administrative Law Judges, and $4,835.01 for costs incurred by claimant in this case, is affirmed.

SO ORDERED.

_____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

_____
GREG J. BUZZARD
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I concur in the majority's determination to affirm the administrative law judge's fee award for counsel's work from December 2, 2011 to June 3, 2014 pertaining to claimant's third modification request filed on March 10, 2011, and, because of Board precedent, in the award of fees for counsel's work from June 29, 2006 to August 6, 2007 and from August 21, 2008 to August 4, 2010.

Employer correctly asserts that all previous administrative law judges found the evidence insufficient to establish either pneumoconiosis or total respiratory disability and, notably, that the administrative law judge found modification established on the

basis of a change in conditions with the effective date of benefits the month in which claimant last requested modification, March 1, 2011. Consequently, employer also appears correct in contending that all of claimant's present success rested on the latest modification filing and *none* of it rested on the services performed before Judges Price and Rae. Under these circumstances, one might question the wisdom of continuing to follow our current precedent.

_____

JUDITH S. BOGGS
Administrative Appeals Judge